POWERS OF SALE AS AFFECTING RESTRAINTS ON ALIENATION.

The vast majority of cases which involve questions concerning the suspension of the power of alienation arise in connection with wills. There are, therefore, usually present two considerations which would naturally impel New York courts to construe the limitations imposed by statute so as to uphold, if possible, the disposition made by the creator. The first is the restriction of permissible suspension to the duration of two specified lives in being at the creation of the estate,[1] this being in derogation of the common law which allowed the employment of any number of lives in being as a measure. The second is the familiar rule that wills are to be upheld whenever it is possible to do so, testacy being preferred to intestacy, and every effort being made to carry out the expressed intention.[2] Moreover, it seems that the tendency in favor of sustaining devises is increasing.[3]

It would, therefore, appear to be a curious anomaly if the courts have given the laws in question too wide a scope in any direction, and have brought under their condemnation cases which were not really offensive to them.

The New York statutes provide, in substance, that the absolute power of alienation of realty, and the absolute ownership of personal property, except in a single case with which we are not here concerned, shall not be suspended for a greater period than that mentioned above—two specified lives in being at the creation of the estate. Such suspension occurs when there are no persons in being who can convey an absolute fee in possession, and this is the sole test provided. The result may be produced in one of two ways. The first, with which the present paper is not concerned, is by the creation of an ultimate contingent interest in some person or class of persons who cannot at the present time be identified. The second is through some arrangement by which, either because of express provision of the creating instrument or by statute, alienation is forbidden.[4]

Now of the four kinds of express trusts permitted by the New York Real Property Law, the third provides for the receipt of

[1] Real Property Law, Section 32; Personal Property Law, Section 2.
[2] Haynes *v.* Sherman (1889), 117 N. Y., 433.
[3] Cochrane *v.* Schell (1894), 140 N. Y., at p. 532.
[4] Wilber *v.* Wilber (1901), 165 N. Y., 451.

rents and profits and their application to the use of the beneficiaries.[5] Subsequent sections make the *cestui que trust's* interest under such circumstances unassignable,[6] nor may the trustee sell "in contravention of the trust."[7] It is obvious, therefore, that during the continuance of such a trust, if nothing more appear, the power of alienation is absolutely suspended.[8]

By judicial construction, although without apparent warrant, this quality of inalienability was extended to trusts of personal property, so that trustees holding a fund to collect the income and apply it to the use of beneficiaries, as well as trustees holding real estate, cannot assign it nor can the beneficiaries dispose of their interest.[9]

Under the statutes the *power* to alien must be taken away if the prohibition is to apply. It follows, therefore, and it is the law, that although a trust of realty or personalty of the character above described is created to endure for a longer period than that established as the maximum for suspension, there is no invalidity, if the trustees or any other persons are expressly empowered to dispose of the property, distribute the proceeds among the beneficiaries and thus terminate the trust at any time. No matter how many may be required to join, and how remote the possibility that they could be persuaded to unite, the *power* is present and the law satisfied.[10] Thus in one recent case it was said: "If the power to alien exists, there is no suspension, no matter how complicated the means, nor how numerous soever the instruments required to carry it into effect."[11]

Such a provision, however, is probably far less usual than one permitting the trustees, without consulting the beneficiaries, to sell any or all of the property in which the trust funds are invested, whenever they consider it advantageous to do so, and invest the proceeds in something else—in other words they are given full power of investment and reinvestment, but have no authority to terminate the trust itself. The courts hold that such a power will

[5] N. Y. Real Property Law, Section 76.

[6] N. Y. Real Property Law, Section 83.

[7] N. Y. Real Property Law, Section 85.

[8] Radley *v.* Kuhn (1884), 97 N. Y., 26; Reeves on Real Property, Section 667. Note (a).

[9] Underwood *v.* Curtis (1891), 127 N. Y. at pp. 537 and 538; Graff *v.* Bonnett (1865), 31 N. Y. 9.

[10] Williams *v.* Montgomery (1896), 148 N. Y., at p. 526.

[11] Mills *v.* Mills (1900), 50 App. Div., at p. 226.

not take a trust out of the condemnation of the statutes. Thus, in a comparatively late case [12] the Court of Appeals said: "The guardian *ad litem* makes the point that the power of sale as expressed in the will, giving the trustees power to sell and to invest and reinvest the proceeds, saves this trust from the condemnation of the statute, as the power of alienation is not suspended. We think this position cannot be maintained, as the estate, notwithstanding the power of sale and its incidents, is still fettered by the trust." So in *Sawyer* vs. *Cubby,*[13] where the right to invest and reinvest was absolute in the trustee, the Court observed: "Since the trustee could not alienate the fund, nor the beneficiary sell his interest, there was of necessity a suspension during the running of the trust."

This is a doctrine that seems to the writer to be an unnecessary extension of the rules against restraints, and to have rendered void countless trusts that were free from the evils against which the restrictions were directed. Moreover, it appears to have arisen in part at least from a failure to distinguish between two wholly different conceptions.

The origin of the prejudice against restraints was somewhat as follows: The Normans introduced the feudal law into England and all lands became inalienable, William the Conqueror recognizing the assistance such a provision would be in enabling him to retain the throne he had acquired by force. This precipitated a struggle of centuries, and gradually the owners of land acquired the power of disposition, until finally the modern rule was evolved that every owner of a fee has of necessity the absolute power to alien, and any attempt to restrain the right is void.[14] It has always been the law, however, that the holder of a lesser estate may have reasonable restrictions attached to his title, and in modern times the problem has been to define exactly what these reasonable limitations are.[15]

This is a very brief and sketchy statement of the reason of the rule from a historical viewpoint. It represented a compromise between the feudal privilege of appropriating land to one family for indefinite periods without the possibility of sale, and the opposite doctrine that land, the source of national wealth, should always be transferable.

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[12] Allen *v.* Allen (1895), 149 N. Y. at p. 288.

[13] (1895) 146 N. Y. 192.

[14] Savage, C. J., in Coster *v.* Lorillard (1835), 14 Wendell at pp. 294 & 295.

[15] Reeves on Real Property, Section 661.

But what is to be given as the reason for its existence at the present time? In *Broadway Bank* vs. *Adams*,[16] the ground assigned was that by such arrangements the beneficiaries' creditors are defrauded. Professor Gray thought it existed rather from the manly Anglo-Saxon belief that sane men should be required to take care of themselves and not be made the recipients of wealth without its responsibilities, like minors and incompetents.[17] But both of these explanations seem inadequate. If creditors are to be protected, those of the first beneficiaries are as worthy of the law's attention as of subsequent *cestuis* and in such event no restriction whatever upon alienation should be permitted. Upon the other hand, Professor Gray's sentimental theory would hardly account for the fact that the rules contain no suggestion whatever that they are directed against sane adults, and that more license is permitted in the case of suspensions created in favor of the infirm or youthful.

As a matter of fact the persistence of any such general doctrine may usually be traced to some economic advantage or necessity rather than to sentiment or the protection of a special class. And it seems quite clear that the protest against the "tying up" of property for indefinite periods arises from the commercial instinct that is deeply implanted in the Anglo-Saxon race, as modified by the equally vigorous tenet that a man may do as he will with his own. If A owns a lot of land which he is unable to use, while it is just what B desires as a location for some enterprise, that will add to the wealth of the community, it is obviously of advantage to everyone that A should be free to sell it to B and invest the proceeds in something more remunerative to himself. And if a restriction in the title by which A holds, made by a man long dead, prohibits the sale, there is an economic loss to all.

This seems to be the real consideration in the minds of courts and legislatures, although they may sometimes assign other reasons, as a sop to tradition. Thus in *Winsor* v. *Mills*,[18] the court said: "The law will not permit real estate, on which the wealth and prosperity of the country so largely depend, to be excluded from the market in this way during a term which may not end for centuries"; and in his opinion in the celebrated New York case of *Hawley* v. *James*,[19] Judge Cowen remarked: "This court certainly went far

[16] (1882) 133 Mass. 170.

[17] Gray, Restraints on Alienation, Section 258.

[18] (1892) 157 Mass. 362. [19] (1836) 16 Wendell at p. 200.

enough when they held that a man may arbitrarily * * * withdraw all his land from market by a vested estate for two lives in being." To the same effect Professor Gray observes: "Inalienable rights of property the law has never sanctioned for they are inconsistent with that ready transfer of property which is essential to the well being of a civilized community, and especially of a commercial republic." [20]

That the New York statutes were framed wholly with a view to preventing the withdrawal of property from the paths of commerce, and not to protect creditors or make men "stand on their own feet," seems clear from a number of considerations. First, there are the negative arguments suggested before. The two lives employed as a measure may be those of entire strangers to the trust,[21] and during their continuation, the income may be distributed among an *unlimited* number of beneficiaries,[22] which would hardly be permitted if creditors were the objects of protection.[23] Moreover, anyone may be a beneficiary, so the purpose was not merely to provide for those unable to care for themselves. Also, the arbitrary selection of two lives seems to indicate that the revisers were thinking wholly of the property itself, rather than of the persons interested, and were intent upon limiting the period for which it could be made non-transferable. This is strengthened by the further provision that not more than two successive life estates may be created in real estate,[24] showing that the legislators had in mind merely to "prevent estates of any kind from being projected into the future" further than the period they had established.[25]

What, then, is the scope of the commercial needs which we may now assume to be the object of the statute's care? It is, obviously, that the ownership of any specific property, whether it be a parcel of land or certain cattle or bonds and stocks, shall be perfectly fluid, free to go wherever it is needed, and to leave those to whom it is no longer of adequate value. If A and B are two men of (theo-

[20] Restraints on Alienation, Section 259.

[21] Bailey *v.* Bailey (1884), 97 N. Y. 460.

[22] Shermerhorn *v.* Cotting (1892), 131 N. Y. at p. 58.

[23] In Rome Bank *v.* Eames (1864), 4 Abb. Ct. App. 83, Denio, J. said: "It is against general principles that one should hold property or a beneficial interest in property, by such a title that creditors cannot touch it. But our statute expressly permits such arrangements."

[24] N. Y. Real Property Law, Section 33.

[25] Reeves on Real Property, Section 666, note (a); Purdy *v.* Hayt (1883), 92 N. Y. 446.

retically) equal ability and character, and A has $10,000.00, there is no economic advantage (or justice) in saying that after a while A must surrender his fund to B, impoverishing himself. Conversely there is no disadvantage in prohibiting A from thus giving away the fund. But if this capital is invested in a parcel of land or certain securities and A is prohibited from selling them, when an advantageous offer is received and he wishes to invest the money elsewhere, it is easy to see that the arrangement might be contrary to sound public policy.

In other words, if a trustee have the absolute right of investment and reinvestment he can sell any of the trust property at any time to any one who wishes it, giving "an absolute fee in possession," the only limitation being that he must receive value for it. He cannot give it away, but its alienability is not restrained for an instant. The property received in exchange has not, of course, been previously subject to the trust, and so, whatever suspension there is with reference to it, begins only from the time of its acquisition. Bearing in mind then the economic origin of these rules, the wholly fluid and intangible character of a "fund," the fact that this fluidity is due to the modern mechanism of exchange, and the reasons given in the opening paragraph for upholding a disposition if possible, the attitude of the courts seems strange. It appears to the writer that the judges in this matter have confused the trusts under consideration with accumulations, although the evils generated by the latter are of a totally different character, and the restrictions upon them have wholly different ends in view.

In 1796 Mr. Thellusson directed that his fortune accumulate during nine named lives before any distribution, when it would probably have amounted to about £19,000,000. There was at the time no law against this, and, as he had kept within the rule against perpetuities, the will was sustained. But Parliament rightly considered that it was economically harmful to permit the swelling of a fund for so long a period, and the result was legislation which has been substantially followed in this country, limiting the time for which an accumulation may continue to the minority of the beneficiaries.[26] It is obvious in the first place that the harmful character of such an arrangement lies in the amassing of a gigantic fortune, continually increasing in size without any one being permitted to enjoy it until the period named by the settlor has expired. In the second place, this evil attaches to the *fund* involved, and has

[26] Washburn, Real Property, 6th Ed., Section 1785.

nothing whatever to do with "tying up" the property in which the fund is invested. As long as the fund continues to "roll up," income being added to principal as received and then itself earning more income, the undesirable element is present, no matter what the character of the investments may be.

There are practically no arguments advanced by the courts to uphold their attitude on the question under discussion beyond those to which reference has been made already. In *Hawley* vs. *James,*[27] Chancellor Walworth said: "The mere exchange of one piece of property for another, by a trustee, under a valid power in trust, is not considered as an alienation of the estate or interest of the *cestui que trust,* or person beneficially interested in the trust estate. The rules of law on the subject of rendering estates inalienable have reference to the substance and not merely to the shadow. * * * As well might it be contended that a bequest of personal property was not rendered inalienable because the trustee who held it for the benefit of another has the right to loan it out from time to time and to receive other money when it became payable, instead of that which was lent, although he had no right to dispose of the fund itself. The money received from the borrower is seldom if ever the same that was lent; yet for every legal or substantial purpose it is the same fund or property."

Here the learned Chancellor first asserts that the Revised Statutes mean a certain thing without citing any authority for his view. Then he says that the rules regard the substance rather than the shadow. But what *is* substance? He proceeds to cite, as an illustration of the absurdity of any other view, the instance of a perfectly "fluid" personalty trust, declaring it bad because the trustee cannot dispose of the "fund." In the writer's view such a trust would be perfectly valid so far as restraints upon alienation are concerned, although of course the legislature might deem it hostile to the public good and pass laws to that effect.

This failure to analyze the situation is observable in almost all of the cases, the courts usually accepting the voidness as an inevitable corollary, and contenting themselves with its statement. When *Hawley* v. *James* was before the Court of Errors on appeal,[28] Judge Bronson merely said: "A power to exchange one piece of property for another, or to sell it for the purpose of investing the proceeds in a different manner, is not a power to alien the estate within the meaning of the statute. The property newly acquired is

[27] (1835) 5 Paige 444. [28] (1836) 16 Wendell at p. 163.

as much a part of the estate as was that which was given for the purpose of affecting the exchange or making the new investment." Of course, that is all true enough, but what of it? Why did not the learned judge explain more in detail how the non-alienability of the fund came within the letter and spirit of the statute?[29] There is one case in which the question was discussed at some length. In *Brewer* vs. *Brewer*,[30] after observing that it had not been directly before the Court up to that time, Judge Brady ventured upon an explanation of the reason for the rule which he proceeded to establish. "There being no doubt," he said, "that the trust created by the testator was void because it suspended the power of alienation for more than two lives in being, the only question to be determined on this appeal is whether such a trust is legalized and rendered valid by the power coupled with it, authorizing the trustees to sell the trust estate. * * * It is based on the proposition that * * * the testator having conferred a valid power of sale, there is a person in being by whom an absolute fee in possession can be conveyed. The answer which seems to meet this question at once and conclusively is that the power of sale is possessed by persons in a representative capacity, and is discretionary and limited because it is for the purposes of the trust only, or in other words to make a change in the character of the trust property for reinvestment and therefore to continue the trust. The statute clearly means persons having an absolute and unqualified unconditional fee by inheritance or purchase, which can be conveyed absolutely, not only with reference to the subject of the conveyance but to the product of its sale. * * * If the appellant's doctrine be correct, then by the simple device of a power of sale for the purpose of reinvestment trust estates can be limited as by the rules of common law during any number of lives, notwithstanding the changes made by the Revised Statutes."

It will be seen that only two reasons were adduced: First, that such a power of sale is for the purpose of the trust only and so not unrestricted; second, that by the "device," trust estates could be limited for any number of lives. A sufficient answer to both arguments is that they apply almost equally well when the proceeds are distributable among the beneficiaries. The termination of the trust cannot have the slightest bearing upon the trustee's power to

[29] Of course it cannot be denied that it is perfectly *possible* to arrive at the court's conclusions as a matter of logic. But the point insisted upon is that every effort should be made to uphold rather than to destroy.

[30] (1877) 11 Hun 147.

give good title to the property he holds. In either case it is incumbent upon him to obtain the best price within reason and to carry out the provisions of the trust in good faith. And the second point seems to beg the question, as the Revised Statutes are hostile to trusts only in so far as they suspend the power of alienation. Under the decisions noted above a trust in perpetuity might be created if only the trustees were given authority to terminate it if they chose.

In brief, a rule designed to facilitate the transfer of property has been extended by judicial interpretation to include an intangible fund of which the property in question forms a part, which is not growing to undesirable proportions, and is not, in any reasonable view, clogging the interchange of possessions. The doctrine has probably become too firmly established to be dislodged except by legislative enactment. But, as observed above, it has had the effect of invalidating many bequests which seem entirely harmless from the viewpoint of morals or public policy, and wholly inoffensive as far as the letter or spirit of the statutes is concerned.

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